IN THE HIGHT COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)
Description of case

INCOME TAX APPEAL NO. 57 of 2002

AND

INCOME TAX APPEAL NO. 63 of 2002

AND

INCOME TAX APPEAL NO. 64 of 2002

AND

INCOME TAX APPEAL NO. 60 of 2003

AND

INCOME TAX APPEAL NO. 63 of 2003

AND

INCOME TAX APPEAL NO. 61 of 2003

AND

INCOME TAX APPEAL NOs. 79,81,84,85,87,92,95,96, 97,98,99,105 of 2002

AND

INCOME TAX APPEALS NOs. 301,307,308,309,311,313,315 of 2001

AND

INCOME TAX APPEAL NO. 458 of 2001

AND

INCOME TAX APPEAL NO. 102 of 2001

AND

INCOME TAX NOS. 558,559,561,562 of 2001

Date of decision: 9th October 2003

For the approval of:

Hon'ble Chief Justice S.H. Kapadia.

Hon'ble Mr. Justice Irshad Hussain.

- Whether the order/judgement should be sent to the reporters for reporting? (Yes)

- Whether the reporters be allowed to see the judgement? (Yes)

HN

IN THE HIGHT COURT OF UTTARANCHAL AT NAINITAL

INCOME TAX APPEAL NO. 57 of 2002

The Commissioner Income-tax Dehradun & another ---- Appellants

Vs.

SEDCO Forex International Drilling Co. Ltd.

---- Respondent

AND

INCOME TAX APPEAL NO. 63 of 2002

The Commissioner Income-tax Dehradun & another ---- Appellants

Vs.

SEDCO Forex International Drilling Co. Ltd. ---- Respondent

AND

INCOME TAX APPEAL NO. 64 of 2002

The Commissioner Income-tax Dehradun & another ---- Appellants

Vs.

SEDCO Forex International Drilling Co. Ltd.

---- Respondent

AND

INCOME TAX APPEAL NO. 60 of 2003

The Commissioner Income-tax Dehradun & another ---- Appellants

Vs.

SEDCO Forex International Drilling Co. Ltd.

---- Respondent

AND

INCOME TAX APPEAL NO. 63 of 2003

The Commissioner Income-tax Dehradun & another ---- Appellants

Vs.

SEDCO Forex International Drilling Co. Ltd.

---- Respondent

AND

INCOME TAX APPEAL NO. 61 of 2003

The Commissioner Income-tax Dehradun & another ---- Appellants

Vs.

SEDCO Forex International Drilling Co. Ltd.

---- Respondent

Mr. S.Kapila, Counsel i/b Mr. S.K. Posti, Advocate for the Appellants.

Mr. P.F. Kaka with Mr. Gulati, Counsel i/b Mr. V.K. Bisht, Advocate for respondent.

AND

INCOME TAX APPEAL NOs. 79,81,84,85,87,92,95,96, 97,98,99,105 of 2002

M/s Hughes Services (Far East) Pvt. Ltd. ---- Appellants

Vs.

Income Tax Appellate Tribunal & others ---- Respondents

Mr. P.F. Kaka with Mr. Gulati, Counsel i/b Mr. V.K. Bihst, Advocate for appellant.
Mr. S.K. Posti, Counsel for the respondents.

AND

INCOME TAX APPEAL NOs. 301,307,308,309,311,313,315 of 2001

M/s Hughes Services (Far East) Pvt. Ltd. ---- Appellants

Vs.

Commissioner of Income-tax, Meerut ---- Respondent

Mr. P.F. Kaka with Mr. Gulati, Counsel i/b Mr. V.K. Bihst, Advocate for appellants.
Mr. S.K. Posti, Counsel for the respondent.

AND

INCOME TAX APPEAL NO. 458 of 2001

Commissioner of Income-tax, Meerut
And another ---- Appellants

Vs.

M/s Hughes Services Far East Pvt. Ltd. ---- Respondent

Mr. S.K. Posti, Counsel for the Appellants.
Mr. P.F. Kaka with Mr. Gulati, Counsel i/b Mr. V.K. Bihst, Advocate for respondent.

AND

INCOME TAX APPEAL NO. 102 of 2001

Commissioner of Income-tax, Meerut
And another ---- Appellants

Vs.

M/s Hughes Services Pvt. Ltd. ---- Respondent

Mr. S.K. Posti, Counsel for the Appellants.
Mr. P.F. Kaka with Mr. Gulati, Counsel i/b Mr. V.K. Bihst, Advocate for respondent.

AND

INCOME TAX APPEAL NOs. 558,559,561,562 of 2001

Commissioner of Income-tax, Dehradun
And another ---- Appellants

Vs.

M/s Hughes Services Pvt. Ltd. ---- Respondent

Mr. S.K. Posti, Counsel for the Appellants.
Mr. P.F. Kaka with Mr. Gulati, Counsel i/b Mr. V.K. Bihst, Advocate for respondent.

Coram: Hon'ble S.H. Kapadia, C.J.,
Hon'ble Irshad Hussain,J.

Date: 9th October, 2003;

ORAL JUDGMENT (Hon'ble S.H. Kapadia, C.J.)

1. This batch of appeals involve common question of law and fact and therefore, they are decided all together by this common judgment.

For the sake of convenience, we are mentioning hereinbelow the facts in I.T.A. No. 57 of 2002.

FACTS

2. Ronald Grey, the assessee, entered into a contract for employment with Sedco Forex International Drilling Company (hereinafter referred to as the said Company) incorporated in Panama. Assessee was the resident of U.K. Under the contract he was required to work on oil rigs in Bombay High as per Alternating Time Schedule of 35/28 days i.e. ON period followed by 35/28 days of OFF period in U.K. Before the Assessing Officer it was contended, on behalf of the assessee, that OFF period salary was not exigible to tax u/s 9(1)(ii) of the Act as it was not earned in India. It was argued that the field break which followed the ON period was not a rest period. A.O. rejected this contention. The order passed by the A.O. was confirmed by CIT (A).

Further, the A.O. held that free food and free beverages and free boarding on the rigs, constituted a perquisite u/s 17(2)(iii). He added their value to the income of the assessee. The A.O. also levied interest u/s 234B on the assessee for short payment of advance tax. The order of the A.O. on all above points was confirmed by CIT (A). Being aggrieved, the matter was carried in appeal to the Tribunal which took the view that field break i.e. the OFF period was not a rest period. That during the break the asessee had to stand by in U.K. and therefore the OFF period salary was not payable for services rendered in India and therefore OFF period salary was not taxable u/s 9(1)(ii) of the Act. Consequently, the Tribunal deleted the levy of interest u/s 234B of the Act. The Tribunal further took the view that free food and beverages and boarding was not a perquisite.

Being aggrieved, department has come by way of appeal u/s 260A of the Act for the assessment year 1992-93.

Arguments:

3. Smt. Kapila, learned counsel for the department, submitted that every receipt which has a nexus with the service rendered in India rules out the dichotomy and separate tax treatment for ON and OFF periods salary. That since the work was arduous during the ON period, a break is given. That despite repeated opportunity, the assessee has failed to produce evidence of his work during the field break. That in the circumstances the A.O. was entitled to conclude that the field break was the rest period. It was further argued that the contract covered both the periods. That the salary was paid under the contract. That the assessment records indicate that the entire salary (including salary for the off period) has been debited to the P&L account of the Employer Company. That the said Company has paid the entire salary to the assessee out of its income from Indian Operations. In the circumstances it was submitted that the payment of salary was for services rendered in India. That it represented income

earned in India u/s 9(1)(ii) read with Explanation as it stood at relevant time.

Learned Counsel for the department further contended that in this case, section 234B was applicable. She contended that ITAT was wrong in holding that section 234B was not applicable to Incomes falling under the head "Salaries". It was submitted that u/s 191 of the Act, in cases of failure to deduct tax at source by the employer the tax has to be paid by the assessee. It was contended that section 234B deals with levy of interest in cases of shortfall in payment of advance tax by assessee. That sections 192, 202 and 208 of the Act does not rule out sub section 191 of the Act. That the Tribunal was wrong in holding that as tax was deductible at source u/s 192 by the employer, the assessee did not incur any liability to pay advance tax u/s 208 and since the assessee did not incur any liability u/s 208, he was not liable to pay interest u/s 234B. It was argued that sections 191 & 208 & 234B all fall in Chapter XVII of the Act and therefore sections 192 & 208 cannot rule out section 191 of the Act which states that if the payer fails to deduct TDS the tax shall be payable by the assesseee directly.

Mr. Porus Kaka, learned counsel for the assessee, on the other hand contended that in the case of contract for employment the right to receive accrues at the place where contract is entered into or where the amount is payable. He argued that the place where the right to receive accrues would be the place where income becomes chargeable. That this is the position u/s 5 of the Act. That however section 9 is an extension to section 5. That u/s 9(1)(i) income from Business Connections in India was taxable. Therefore u/s 9(1)(i) only income from business operations in India, as far as non-residents are concerned, is taxable. That similarly u/s 9(1)(ii) read with Explanation (introduced by Finance Act of 1983 w.e.f. 1.4.1979), income payable for service rendered in India is regarded as "income earned in India" u/s 9(1)9(ii) of the Act. It was therefore contended that the intention of the legislature is to tax only a specific type of income which arises

from operations in India u/s 9(1)(i) or which has nexus to services rendered in India u/s 9(1) (ii) read with above explanation. It was further argued that under the contract in question Off Period did not represent Rest period. That during the off period, the assessee had to stand by. That, he could not move out of U.K. That, he could be summoned by the Company at any time. That, the salary received by him for off period was therefore not taxable u/s 9(1)(ii) as it was payable for services rendered outside India. That looking to the scope of section 9(1)(ii) read with above explanation it was necessary to dichotomize between what is payable for ON period vis-a-vis what is payable for Off period and if so the said salary for Off period was not taxable. It was further argued that if the assessee works for 28 days and resigns on the 29th day he does not get salary for the off period. That the payment was against the field break and therefore the said break did not represent rest period. That the field break did not represent rest period. That it was not for service rendered in India and therefore it was not taxable. It was further argued that the department is seeking to tax the income earned by the assessee abroad during the break which was not permissible. Learned counsel for the assessee further argued that his interpretation finds support from the substituted Explanation introduced by the Finance Act of 1999. It was further argued that the non-resident Company (employer) is taxable on notional profits u/s 44BB of the Act and therefore there is no question of that Company claiming deduction in respect of salary which it has paid to the assessee. It was argued that the said Company was taxed on presumed income and therefore the question of that Company paying salary from its income from India operations was irrelevant. On the question of levy of interest u/s 234B of the Act, it was argued on behalf of the assessee that u/s 207, 208, 209(1)(a)(d) the assessee had to estimate his current income u/s 234B and if the said Company had made short deduction of the tax at source then the said Company was liable u/s 191 of the Act. That in such cases the department had a right to move against the employer Company u/s 201 for recovery of

balance tax with interest u/s 201(1A). That where any income was liable to TDS, Section 234 B was not applicable. That even assuming that section 191 was applicable, no interest is chargeable u/s 234B on the assessee for failure on the part of his employer to deduct TDS.

4. The first question which arises for determination is as follows:-

Question:

" Whether, the Tribunal was right in holding that "OFF Period Salary" was not taxable u/s 9(1)(ii) read with the Explanation as it stood at the relevant time?"

Answer:

In facts and circumstances of this case, our answer is in the Negative i.e. in favour of the department and against the assessee.

REASONS

Section 4 of the Act is a charging section. It imposes tax on the total income of the previous year of every person. Under section 4(2), tax is deducted at source or paid in advance, where it is so deductible or payable. Section 5(2), on the other hand, restricts the scope of total income of a non-resident to the income which is received or deemed to be received in India or which accrues or which is deemed to accrue to him during such year.

Section 9(1)(ii) interalia lays down that income which falls under the head "Salaries", if it is earned in India, shall be deemed to accrue to the non-resident during such year. Therefore section 9 is a deeming section. It brings in certain types to incomes, which may not come u/s 5, into the definition of "Total Income" u/s 2(45). Section 9(1) (ii) read with Explanation provides for an artificial place of accrual for income taxable under the head "Salaries". It enacts that income chargeable under the head "Salaries" is deemed to accrue in India if it is earned in India i.e. if the services under the contract for employment is rendered in India. In such a case, the place of receipt or actual accrual of salary is immaterial. In this case we are concerned with application of law to the facts of this case.

It is well settled that in order to ascertain the intention of the contracting parties one has to study the terms and conditions of the contract and in appropriate cases one has to see the surrounding circumstances including the conduct of the parties. In this cases the contract provides for ON Period and Off periods. The contract is for two years. It refers to Alternating Time Schedule. It covers both the periods. The Off period follows the ON periods. Therefore both the periods form an integral part of the contract. It is not possible to give separate tax treatments to On periods and Off period salaries. It is argued that period following ON period was not a rest period. We do not find any merit. After 35/28 days of hard work, the technician had to go back to the country of his residence. The Off period followed the ON period. They both formed part of and Integral scheme. That even under the Finance Act of 1999 the new explanation uses the term "Rest period/Leave period". For above reasons we find merit in the arguments of the revenue. Further even assuming that the period following ON period was a standby arrangement and not a Rest period, we find that the assessee had to undergo training during the said period. It is important to note that the work on the oil rigs is hazardous. The assessee had to remain fit during the rest period. Hence he had to undergo demonstrations and training but all that has a nexus with the services which he had to render in India. Hence the payment which he received was for his services in India. In this connection it may be noted that the Explanation to section 9(1)(ii) introduced by Finance Act of 1983 refers to what constitutes "income earned in India". This Explanation was introduced by Finance Act of 1983 w.e.f. 1.4.1979 to get over the judgment of Gujarat High Court in 124-ITR-391 in which it was held that in order to attract section 9(1)(ii) of the Act, liability to pay must arise in India. By the said Explanation, the original intention u/s 9(1)(ii) has been revived. It explains the expression "income earned in India" to mean payment for the services in India even if the contract is executed outside India or amount is payable outside India. However, from the said

Explanation it is not possible to infer the corollary viz that in all cases where services are rendered outside India, the salary cannot be deemed to accrue in India, ipso facto. In certain cases, even if the services were rendered outside India, the income can still accrue or arise in India. It would depend on facts of each case. In this case even assuming that there was no rest period as alleged by the assessee and that payment was for stand by, we are of the view that training abroad during this period was directly connected with the work on the rigs in India. It made that Assessee mentally and physically fit. Therefore the payment of salary for OFF period was income earned in India i.e. for services rendered in India u/s 9(1)(ii).

Lastly, we would like to point out that in this case the assessment records show that from the income of the Indian operations the salary in its entirety (including salary for the off period) has been paid by the employer Company. This conduct shows the intention of the contracting parties. Hence the entire salary for both the periods was taxable in India u/s 9(1)(ii).

5. The next question which has arisen for determination is as follows:-

Question:

> "Whether, the Tribunal was right in holding that free food, beverages and boarding on the rig was not a perquisite u/s 17(2)(iii)?"

Answer:

> On the facts of this case we answer this question in the affirmative i.e. in favour of the assessee and against the department.

REASONS

In this case, assessee had to work on the rig. It was hazardous, arduous, and continuous. Under such circumstances free food and beverages is a necessity. It is not a luxury. It is not a perquisite. Its value cannot be added to the income of the assessee.

6. The last question, referred to us for our opinion is as follows:-

Question:

"Whether the Tribunal was justified in deleting interest levied on the assessee u/s 234B?"

Answer:

In view of the facts and circumstances of this case our answer is in the affirmative i.e. in favour of the assessee and against the department.

REASONS

Although we agree with the conclusions of the Tribunal, we prefer to give our own reasons in support our conclusion that on facts and circumstances of this case, levy of interest u/s 234B on the assesse is not justified. Firstly, the decisions of the Tribunal on the interpretation of the contracts regarding ON period and OFF period salary were conflicting. Ultimately the legislature has stepped in to clarify the position by Finance Act of 1999. In this connection it is important to note that section 234B imposes interest, which is compensatory in nature and not as a penalty (See Union Home Products Vs Union of India reported in 215-ITR-758 at page 766). Secondly, although section 191 of the Act is not over-ridden by sections 192, 208 & 209(1)(a)(d) of the Act, the scheme of sections 208 & 209 of the Act indicates that in order to compute advance tax the assessee has to interalia estimate his current income and calculate the tax on such income by applying the rates in force. That u/s 209(1)(d) the income-tax calculated is to be reduced by the amount of tax which would be deductible at source or collectible at source, which in this case has not been done by the employer company according to the law prevailing for which the assessee cannot be faulted. As stated above at the relevant time there were conflicting decisions of the Tribunal. A bonafide dispute was pending. The assessee had to estimate his current income. The words used u/s 209(1)(a) makes the Assessee estimate his current income and since a bonafide dispute was pending, imposition of interest u/s 234B was not justified without hearing and without reasons. Accordingly, we answer this question in the affirmative i.e. in favour of the assessee and against the department.

7. Accordingly, all the above Income Tax Appeals are disposed of with no orders as to cost.

(Irshad Hussain, J.) **(S.H. Kapadia, C.J.)**

HN